Supreme Court, U.S.
FILED

No. 04-1391

APR 14 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

HOMI N. AMIRMOKRI,

Petitioner,

v.

SAMUEL W. BODMAN, Secretary, U.S. Department of Energy,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Homi N. Amirmokri
15404 Pin Cherry Lane
Gaithersburg, Maryland 20878
(301) 903-7728

Pro Se Petitioner

THE LEX GROUP DC • 1750 K Street, NW • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge issued confusing jury instructions during a trial.

2. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge improperly allowed untimely evidence to be introduced at trial.

3. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge improperly denied an expert/treating physician the opportunity to testify as a hybrid witness.

4. Whether the Fourth Circuit Court of Appeals erred – contrary to decisions of this Court, and several other Circuits – in failing to find that the District Court Judge failed to properly question a juror.

PARTIES AND CORPORATE DISCLOSURE

Pursuant to this Court's Rule 14, a complete list of Petitioners follows:

1. The full name of every party represented.

I am filing this pro se.

2. The name of the real parties in interest represented by me are:

Not Applicable.

3. All parent companies and any public held companies that own 10 percent or more of the stock of the party represented by me is:

Not Applicable.

4. The names of all the law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial or agency or are expected to appear in this court are:

Homi N. Amirmokri, Pro Se
15404 Pin Cherry Lane
Gaithersburg, MD 20878
(301) 903-7728 (W)
(301) 987-2778 (H)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES AND CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

I. Factual Background 2

II. Proceedings Below 4

REASONS FOR GRANTING THE WRIT 5

I. Confusing Jury Instructions 5

II. Late Produced Evidence 6

III. Dr. Bahar not being able to testify as an expert 8

IV. Juror No. 143 being allowed to serve as a juror 8

CONCLUSION 10

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases:

Cabrera v. Jakabovitz,
24 F.3d 372 (2d Cir. 1994) 5

Coles v. Perry,
217 F.R.D. 1 (2003) 7, 8

Costa v. Desert Palace, Inc.,
299 F.3d 838 (9th Cir. 2002), aff'd,
154 L. Ed. 2d 766, 537 U.S. 1099,
123 S. Ct. 816 (2003) 6

Dudlev v. Wal-Mart Stores, Inc.,
166 F.3d 1317 (11th Cir. 1999) 6

Gehring v. Case Corp.,
43 F.3d 340 (7th Cir. 1994) 6

Gordon v. New York City Bd. of Educ.,
232 F.3d 111 (2d Cir. 2000) 5-6

Kitchen v. Chippewa Valley Schools,
825 F.2d 1004 (6th Cir. 1987) 5

Loeb v. Textron, Inc.,
600 F.2d 1003 (1st Cir. 1979) 5

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 5, 6

Messina v. Kroblin Transportation Systems, Inc.,
903 F.2d 1306 (10th Cir. 1990) 6

Mullen v. Princess Anne Volunteer Fire Co., Inc.,
853 F.2d 1130 (4th Cir. 1988) 6

Sharkev v. Lasmo (AUL LTD.),
214 F.3d 371 (2d Cir. 2000) 5

Walther v. Lone Star Gas Co.,
952 F.2d 119 (5th Cir. 1992) 6

Williams v. Valentec Kisco, Inc.,
964 F.2d 723 (8th Cir. 1992) 6

Yeti By Molly Ltd. v. Deckers Outdoor Corp.,
259 F.3d 1101 (9th Cir. 2001) 8

Constitutional Provision:

U.S. CONST. amend. V 1

Statute:

28 U.S.C. § 1254(1) 1

Rules:

Sup. Ct. R. 14 ii

L. R. 104.10 8

Fed. R. Civ. P. 26(a)(2)(A) 8

Fed. R. Civ. P. 26(a)(2)(B) 8

Fed. R. Civ. P. 26(e) 7

Fed. R. Civ. P. 37 7

Fed. R. Civ. P. 37(c)(1) 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner Homi N. Amirmokri respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the Fourth Circuit Court of Appeals ("Fourth Circuit") is attached hereto. (App. 1a-3a).. The opinion of the trial court is attached hereto (App. 4a).

JURISDICTION

The judgment below was entered on January 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides for procedural due process which in this case requires the Federal Courts to uniformly apply jury instructions when dealing with Constitutional Due Process Issues.

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. Factual Background

1. The Plaintiff, Homi N. Amirmokri, was born in Iran and immigrated to the United States in 1974. The Defendant, the United States Department of Energy, hired Amirmokri in July 1991 to work in its Office of Nuclear Energy, Science, and Technology (NE) in Germantown, Maryland. Amirmokri has worked there since that date. Amirmokri has a bachelor of science in nuclear engineering and a professional engineering license. He had over ten (10) years experience in nuclear engineering and design before coming to DOE.

2. By May 1998, Amirmokri was qualified for a position as a program manager for a nuclear reactor by virtue of his education and experience before DOE, and seven years performing similar job functions for DOE.

3. In May 1998, Robert Lange, Amirmokri's first-line supervisor and Director of Nuclear Facilities Management, asked Amirmokri to take over Headquarters responsibility for facilities NE manages at Oak Ridge National Laboratories (ORNL) in Tennessee. NE is responsible for oversite of several ORNL facilities including the High Flux Isotope Reactor (HFIR) [*pronounced High-Fur]*. At that time, HFIR was one of two category 1 research reactors operated by DOE. The other research reactor was the Advance Test Reactor in Idaho (ATR). After May 1998, Amirmokri performed the same duties that the program manager of ATR performed. Amirmokri was still a GS-14. Lawrence Miller, the program manager for ATR, was a GS-15. William Magwood has been Amirmokri's second-line

supervisor, and the Director of NE, since June 1998. Close to the time Magwood was appointed, Amirmokri and several other foreign-born NE employees met with Magwood to complain that NE had a history of deliberately overlooking foreign-born employees in making promotions. Director Magwood has the authority to make all promotion decisions within NE including the power to create new salary grade 15 positions. NE has a practice of grooming employees for promotion and tailoring promotional opportunities to the skills and experiences of persons judged to be deserving of promotion.

4. Between the time Amirmokri started working as ORNL Headquarter Program Manager, May 1998, and the time Magwood selected him for promotion, Magwood approved more than a dozen promotions to Grade 15, the Senior Executive Service, and the Excepted Service. These promotions included promotion of at least five U.S.-born employees to grade 15 nuclear engineering positions. Each of the five (Lisa Herrera, Dan Funk, Robert Price, Kevin Shaw and John Wheeler) had worked less time than Amirmokri in the areas in which they were promoted.

5. In January 2000, Lange told Amirmokri to assemble his application materials for a promotion. In February 2000, NE announced a vacancy for a GS-15 Program Manager for the Fast-Flux Test Facility (FFTF), an inactive reactor. Lange told Amirmokri the promotion was not for him, but that he was next. Magwood selected Dan Funk, who was already working on FFTF. In May 2000, Lange told Amirmokri that the promotion appeared less likely. Amirmokri tried to tried to persuade management to conform the position description to match his duties as required by DOE procedures. On October 11, 2000, Amirmokri began the equal employment opportunity (EEO) complaint process.

6. On March 23, 2001, during the EEO investigation, Amirmokri learned he had been selected for promotion to a Salary Grade 15 position as HFIR program manager. The workload for the HFIR (and the other nuclear facilities) program manager has been heavy for a number of reasons. As a result, Amirmokri has worked 3600 hours of uncompensated overtime between May 1998 and December 2001. In contrast, the normal workweek for a nuclear engineer in NE, nearly all of whom are U.S.-born, is a little over 40 hours.

7. In September 2000, Amirmokri asked Lange to approve use of annual leave for vacation. Lange told Amirmokri that if he took time off, his duties would be given to others. DOE employees are permitted to carry 240 hours of leave from one year to the next. Any leave balance above 240 hours is lost unless the supervisor approves a carryover. Amirmokri asked Lange to authorize carryover of his leave balance to the next year. Lange refused. Amirmokri also wanted to carry unused leave in the calendar year 2001. Lange denied the request.

II. Proceedings Below

1. On May 25-27, 2004, a jury trial was held in the District Court of Maryland.

2. On May 28, 2004, the District Court of Maryland entered an Order of Judgment against the Plaintiff.

3. On January 14, 2005, the Fourth Circuit Court of Appeals affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

I. Confusing Jury Instructions

Several times in the Judge's instructions to the jury, he used the terms and framework of a prima facie case. See Instruction 6, Page 574 of the Transcript (App. 21a-22a); See also Instruction 8, 9, and the discussion of relation. (App. 22a-23a) Several courts have held that giving instructions which include prima facie instructions can be confusing to a jury. The "order and allocation of proof" are not matters for which juries are responsible - and, as the First Circuit pointed out in a leading case decided six years after McDonnell Douglas, the McDonnell Douglas opinion "was not written as a prospective jury charge. . . ." Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979). Heavily freighted with technical legal language ("prima facie case," e.g.), the McDonnell Douglas opinion was written for an audience of judges and lawyers. To read [the opinion's] technical aspects to a jury, the Loeb court said, ". . . will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination." Id. Cf. Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1012 (6th Cir. 1987), where we quoted this passage from Loeb with approval.

Other courts of appeals have likewise followed Loeb's lead. See, e.g., Cabrera v. Jakabovitz, 24 F.3d 372, 380 (2d Cir. 1994) (bemoaning the fact that "lawyers are still prone to include in requested jury charges language that was written by appellate courts in the context of bench trials - language that is at best irrelevant, and at worst misleading to a jury"); Sharkev v. Lasmo (AUL LTD.), 214 F.3d 371, 374 (2d Cir. 2000) ("We agree that juries should not be charged on the McDonnell Douglas burdening-shifting framework"); Gordon v. New York City Bd. of Educ., 232 F.3d 111, 118 (2d

Cir. 2000) ("The jury. . . does not need to be lectured on the concepts that guide a judge in determining whether a case should go to the jury"); Mullen v. Princess Anne Volunteer Fire Co., Inc., 853 F.2d 1130, 1137 (4th Cir. 1988) (burden-shifting instructions "are beyond the function and expertise of the jury, which need never hear the term 'prima facie case'"); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing"); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (trial judge acted correctly in declining "to walk the jury through the paradigm established by McDonnell Douglas"); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 731 (8th Cir. 1992) (reiterating that "the McDonnell Douglas 'ritual is not well suited as a detailed instruction to the jury' . . ."); Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002) (en banc) ("it is not normally appropriate to introduce the McDonnell Douglas burden-shifting framework to the jury"), aff'd, 154 L. Ed. 2d 766, 537 U.S. 1099, 123 S. Ct. 816 (2003); Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306, 1308 (10th Cir. 1990) ("The McDonnell Douglas inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury"); Dudlev v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) ("We stress that it is unnecessary and inappropriate to instruct the jury on the McDonnell Douglas analysis").

II. Late Produced Evidence

The Defendant produced documents well after the close of Discovery which were allowed in as evidence at the Trial. The Defendant produced Stamos' notes late; See Page 213 of the Transcript (App. 20a-21a; App. 48a-56a). The Defendant should have been sanctioned for late production of important evidence. Discovery material, see Pages 86, 87,

132 and 204 of the Transcript (App. 10a-14a, 18a-19a; App. 48a-59a) was used at the Trial as well. The evidence was produced late, and the District Court should not have allowed it to be entered or used. The Defendant displayed a pattern of producing critical documents late to Plaintiff's prejudice (App. 36a-47a).

The government's tactic of not making adequate and timely disclosures and not supplementing discovery responses until at or just before trial was roundly condemned by Magistrate Judge Facciola in three separate opinions. Coles v. Perry, 217 F.R.D. 1 (2003). In his words:

> "Fed. R. Civ. P. 26(e) requires a party who had made an initial disclosure or responded to a request for discovery to supplement its disclosure or response if that party learns that in some material respect the information previously disclosed is incomplete. [Defendant's post-summary judgment] letters. .. were not in compliance. . . In reality, defendant's counsel was attempting to rescue the defendant from its failure to disclose the documents when it should have. . . To say that disclosure after the discovery deadline is harmless ignores that a central purpose of setting a discovery deadline is to move the case expeditiously forward from the end of discovery, through dispositive motions, to pre-trial and trial. I, therefore, . . . find that Defendant did not comply with its obligations as to the disclosure of the documents and witnesses and I must invoke the automatic sanction required by Fed. R. Civ. P. 37 (c) (1) of excluding the evidence unless defendant establishes that the failure to disclose the document or the witness was harmless." 217 F.R.D. at 5.

In Coles, Judge Facciola invoked Rule 37's automatic sanction of exclusion when the government attempted to

offer evidence at trial that was first produced in letters from its counsel well after discovery had closed. Id. He was eminently correct in doing so. E.g., Yeti By Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001). The same outcome should have occurred here.

III. Dr. Bahar not being able to testify as an expert

The Judge ruled that anything connected with what he did or saw would be okay, but that Dr. Bahar could not give expert opinions about what did or did not cause the stress because Defendant was not on notice so it is unfair. See Pages 161-165 of the Transcript (App. 14a-18a). The Local Rule 104.10 states:

> Actions and Witnesses Exempted From Provisions of Fed. R. Civ. P. 26(a)(2)(B). Unless otherwise ordered by the Court a party must provide the disclosures required by Fed. R. Civ. P.26(a)(2)(B) only as to experts retained or specially employed by a party to provide expert testimony. The disclosures need not be provided as to hybrid fact/expert witnesses such as treating physicians. The party must disclose the existence of any hybrid fact/expert witness pursuant to Fed. R. Civ. P.26(a)(2)(A), and an adverse party may obtain the opinions of such witnesses (to the extent appropriate) through interrogatories, document production requests, and depositions.

The District Court was in error and affected the outcome of the Trial.

IV. Juror No. 143 being allowed to serve as a juror

Juror No. 143 worked as an administrative secretary for the chief judge at the Department of Energy. Page 14 of the Transcript (App. 5a-6a), the Judge said, "Okay. I guess this is a related question. I'm at, counsel, question 13. Have

you ever worked for a lawyer? That's paralegal or some other capacity where you'd have knowledge of law. I guess that's a related question."

Page 14 of the Transcript (App. 5a), "Prospective Juror: 143. Many years ago I was an administrative secretary for the chief judge at the Department of Energy."

Juror No. 143 was selected. See Page 43, of the Transcript. (App. 9a)

There were no follow up questions by the Judge, for Juror No. 143.

For other jurors there were follow up questions.

Page 38 of the Transcript (App. 8a-9a), "The Court: All right, ladies and gentlemen, are there any other reasons that you have not given us that would prevent you from sitting in fair and impartial judgment? Any other reasons, other things you can think of that would prevent you from sitting, if selected, during these three days for this trial? All right. We assume by your silence there's nothing else. Yes."

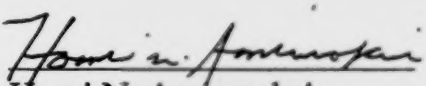
Page 32 of the Transcript (App. 7a), "The Court: All right. Would you be able to put aside your own personal experience with that and concentrate on the evidence in this case and my instructions and give a fair judgment?"

Failure to question Juror No. 143 regarding her feelings like other jurors were questioned, was error.

CONCLUSION

The petition for Writ of Certiorari should be granted for the foregoing reasons.

Respectfully submitted,



Homi N. Amirmokri
Pro se Petitioner
15404 Pin Cherry Lane
Gaithersburg, MD 20878
(301) 903-7728 (W)
(301) 987-2778 (H)